IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PRING CORPORATION, a Washington corporation,	)	**No. 27136-6-III**
Respondent and Cross-Appellant,	)	
v.	)	
CLIPPER CAPITAL MANAGEMENT, INC., a California limited liability company; JEFFREY A. MORGAN and DENISE VELASQUEZ-MORGAN, husband and wife, and the marital community comprised thereof; DAVID F. HALLARAN and MELINDA HALLARAN, husband and wife, and the marital community comprised thereof,	)	**Division Three**
Defendants,	)	
BRETT AWBREY and JENNIFER AWBREY, husband and wife, and the marital community comprised thereof,	)	**UNPUBLISHED OPINION**
Appellants.	)	

Sweeney, J. – A limited liability company leased a building to operate a sandwich shop. Members of the limited liability company guaranteed the company's lease obligations. The limited liability company defaulted on the lease. The lessor sued the guarantors for payment. The trial court asserted personal jurisdiction over the guarantors, awarded judgment to the lessor, and awarded attorney fees. We affirm the judgment but remand for reconsideration and entry of appropriate findings of fact and conclusions of law on the award of fees for the trial court proceeding. We also award fees on appeal.

FACTS

Clipper Capital Management, Inc., LLC, is a California limited liability company. It leased commercial property located in Spokane County from Pring Corporation, a Washington corporation. Brett Awbrey, Jeffrey Morgan, and David Hallaran own Clipper. They and their wives (Jennifer Awbrey, Denise Velasquez-Morgan, and Melinda Hallaran, respectively) each personally guaranteed Clipper's obligations under the lease.

Clipper opened a sandwich shop on the property in June 2005. It closed the shop in September 2006. It then notified Pring in December 2006 that it had abandoned the property. Clipper gave Pring permission to enter the property, supervise the removal of Clipper's equipment, and negotiate a sublease with a business called The Sourdough

Place. Negotiations with The Sourdough Place broke down and the building was not subleased.

The Clipper lease with Pring provided that Pring could lease the property to a new tenant if Clipper failed to pay rent and the failure continued for 10 days after Pring provided Clipper written notice of the failure to pay. The Awbreys paid Clipper's rent through May 2007 pursuant to their guaranty, but then they failed to pay rent in June. Pring sent Clipper and the Awbreys a default notice, on June 29, and gave them 10 days to cure the default or surrender the property. Pring leased the property to a new tenant on July 18. But the new tenant did not begin paying rent until September. The Awbreys paid one-third of the rent owed for June on July 24. Neither Clipper nor the Awbreys paid rent for July or August. As of August 9, Clipper and/or the guarantors owed $8,679.03 in unpaid rent, plus interest.

Pring sued Clipper and the guarantors for unpaid rent for June, July, and August 2007, plus interest. The court entered a default judgment against all defendants except Mr. and Ms. Awbrey. The Awbreys answered Pring's complaint and moved to dismiss the action against them for lack of personal jurisdiction.

Pring moved for summary judgment. The Awbreys then moved to amend their answer to add additional defenses. The trial court concluded that the Awbreys' proposed

additional claims were futile, prejudicial, or irrelevant and denied the motion to amend. It also denied the Awbreys' motion to dismiss for lack of personal jurisdiction. The court then awarded Pring judgment and attorney fees in the amount of $15,732.50.

The Awbreys appeal the trial court's refusal to allow them to amend their answer and the summary judgment in favor of Pring. Pring cross-appeals the trial court's refusal to award their full attorney fees.

DISCUSSION

Personal Jurisdiction – Awbreys

The Awbreys contend that the court lacked personal jurisdiction over them because they did not consent to jurisdiction and the requirements of Washington's long arm statute were not satisfied. Pring responds that the Awbreys consented to personal jurisdiction by guaranteeing the lease. And it responds that extension of personal jurisdiction would not offend traditional notions of fair play and substantial justice, in any event.

None of the material facts are disputed. And so the question of jurisdiction is a question of law that we will review de novo. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992).

A. Consent

A party may consent to personal jurisdiction by written agreement. *Kysar v. Lambert*, 76 Wn. App. 470, 484, 887 P.2d 431 (1995). And here the Awbreys guaranteed performance of the lease. That lease included a consent-to-jurisdiction clause:

> **Governing Law and Venue**. This Lease shall be governed by the laws of the State of Washington. Tenant specifically consents to jurisdiction and venue in Spokane County, Washington.

Clerk's Papers (CP) at 163. The lease defines "Tenant" as "Clipper Capital Management, LLC d/b/a Quiznos Sub and . . . any permitted assignee." CP at 132.

The Awbreys maintain that the "Governing Law and Venue" clause does not apply to them personally because the clause is not expressly incorporated into the guaranty. The guaranty they signed suggests otherwise:

> **GUARANTY.** Each person, undersigned as Guarantor, hereby unconditionally and personally guarantee payment to the Landlord of all Rent and all other sums which are or hereafter become due from the Tenant to the Landlord, *including, without limitation, timely and faithful performance of all obligations of the Tenant* under this Lease.

CP at 167 (emphasis added). And, significantly, the Awbreys provide us with no authority to the contrary.

B. Long Arm Jurisdiction

But, even accepting their argument at face value, the court here properly exercised long arm jurisdiction over the Awbreys as guarantors. Washington courts may exercise

personal jurisdiction over nonresident defendants who have transacted business in this state. RCW 4.28.185(1)(a). The plaintiff must satisfy the following factors to establish jurisdiction over a nonresident:

> (1) The nonresident defendant purposefully did an act or consummated a transaction in Washington;
> (2) Plaintiff's suit arises from the act or transaction; and
> (3) Washington's assumption of jurisdiction does not offend traditional notions of fair play and substantial justice.

Tyee v. Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963). We address each factor in order.

1. Purposeful Act or Transaction

Pring contends that the Awbreys purposefully acted in Washington by guaranteeing a commercial lease of Pring's real property. Executing a contract with a Washington resident, by itself, does not satisfy the purposeful activity requirement. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 423, 804 P.2d 627 (1991). We evaluate "the entire business transaction, including prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing" to determine whether the Awbreys established minimum contacts with Washington by entering into a contract with Pring. *Id.*

The circumstances of the parties' transactions, negotiations, contract terms, and

actual course of dealing, when viewed together, convince us that the Awbreys established minimum contacts with Washington. Clipper contacted Pring and requested a lease. Pring and Clipper (through its managing member, Mr. Morgan) negotiated the terms of the 10-year lease, including the guaranty. Pring insisted that Clipper's owners and their wives, including Mr. and Ms. Awbrey, personally guarantee Clipper's obligations, including the obligation to pay rent. The Awbreys did not personally negotiate the terms of the guaranty. They were, however, aware of the guaranty. And they knowingly guaranteed Clipper's obligation by signing the lease in California. Clipper then stopped paying rent less than two years after signing the lease. The Awbreys nonetheless paid several months' rent to Pring after Clipper failed to pay.

The link connecting the Awbreys to Washington may consist of affirmative acts outside of Washington in contemplation that some phase of it will take place in Washington. *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 684, 430 P.2d 600 (1967). Clipper initiated contact with Pring for the lease. And although the Awbreys physically executed the guaranty in California, they acted in anticipation that they might become liable for rent owed to Pring (a Washington corporation) for commercial property located in Washington. Signing the guaranty and paying Clipper's rent when Clipper, the LLC, defaulted is, for us, sufficient evidence of

purposeful activity with Washington.

2. Cause of Action Arising from Contract

We next apply a "but for" test to determine whether Pring's cause of action against the Awbreys arises from their purposeful contact with Washington. *Byron Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462, 467-68, 975 P.2d 555 (1999). Jurisdiction is proper if the events giving rise to the action would not have occurred "but for" the Awbreys' acts. *CTVC of Hawaii v. Shinawatra*, 82 Wn. App. 699, 719, 919 P.2d 1243 (1996).

The Awbreys agreed to be personally liable for Clipper's obligations in the event Clipper defaulted. But for the guaranty, then, the Awbreys would not be personally liable for Clipper's debts or breach of a guaranty. And, but for the guaranty, Pring could not have sued the Awbreys personally for back rent owed by Clipper. Pring's action, then, arises from and directly concerns the Awbreys' personal guaranty.

3. Fair Play and Substantial Justice

"Finally, the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice in light of the quality, nature, and extent of the defendant's activity in the state; the relative convenience of the parties; the benefits and protection of the laws afforded the respective parties; and the basic equities of the situation." *Raymond v.*

Robinson, 104 Wn. App. 627, 641, 15 P.3d 697 (2001).

The Awbreys' acts were purposeful in facilitating the lease between Pring and Clipper. The Awbreys guaranteed the Washington lease and then personally paid Clipper's rent to Pring for several months before defaulting in June 2007. The Awbreys maintain that jurisdiction in Washington is inconvenient because they are California residents. But the Awbreys knew they were entering a long-term contract with a Washington corporation by signing the guaranty. They reasonably should have anticipated being hailed into a Washington court to defend an alleged breach of that guaranty.

Moreover, the material facts of breach in this case were undisputed: Pring was entitled to back rent; the Awbreys paid that rent as guarantors for a period of time without objection and only later refused to do so. We conclude, then, that extension of Washington's jurisdiction over the Awbreys does not offend traditional notions of fairness and justice. *See Raymond*, 104 Wn. App. at 642-43 (reaching the same conclusion on similar facts); *see also Byron Nelson Co.*, 95 Wn. App. at 468 (same).

Motion to Amend Answer

The Awbreys next assign error to the court's refusal to allow them to amend their answer to add counterclaims and cross claims. Again, however, they offer no authority in

support of the argument. And we need not consider arguments for which a party has cited no authority. *Hous. Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 188, 19 P.3d 1081 (2001). Nonetheless, the court's refusal to allow the amendment appears appropriate.

We review a trial court's denial of a motion to amend a pleading for abuse of discretion. *Del Guzzi Constr. Co. v. Global Nw. Ltd.,* 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

The Awbreys moved to amend their answer to add (1) a breach of contract claim against Pring, alleging failure to provide proper notice before repossessing the rental property, (2) a breach of agent's duty of care against Pring, (3) a breach of implied duty of good faith and fair dealing against Pring, (4) claims of contribution against defaulted defendants Morgan and Hallaran, and (5) a claim of forgery against defaulted defendant Ms. Velasquez-Morgan.

"[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." CR 15(a). The trial court here, however, denied the Awbreys' motion for several reasons.

The court denied the request to add the affirmative defense that Pring failed to provide proper notice because the claim was futile. A court properly denies a motion to

amend a pleading when the proposed amendment is futile. *Ino Ino, Inc. v. City of Bellevue,* 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997). A claim is futile where no evidence supports or proves it. *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 279, 191 P.3d 900 (2008).

The Awbreys wanted to claim that Pring failed to notify them that it repossessed the leased property when it attempted to lease the property to a new tenant after Clipper abandoned the property but before Clipper and the guarantors defaulted on rent. But the record shows that Pring entered the property at Clipper's request to show the property to a potential subtenant and to show Clipper's restaurant equipment to an interested buyer.

The record also shows Pring did not repossess or again lease the property until after Clipper and the guarantors stopped paying rent. The Awbreys failed to pay rent in June 2007. Pring sent the Awbreys a notice of monetary default on June 29 and gave them 10 days to cure the default pursuant to the lease. The Awbreys only partially paid June rent on July 24, more than 10 days later. Pring then had authority under the lease to enter and lease the rental property without notifying the Awbreys. And, by July 18, Pring leased the property to a new tenant. On these facts, the Awbreys were not entitled to notice of repossession. The trial court, then, properly denied the motion to amend the Awbreys' answer to add this futile breach of contract claim.

The court also denied the Awbreys' request to add claims that Pring breached its duties of care and good faith. It reasoned that the claims were irrelevant to the damages sought by Pring. A court properly denies a motion to amend when the amendment would prejudice the opposing party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Prejudice arises when a motion to amend seeks to introduce remote issues to a case. *See id.* at 165-66 (introduction of remote issues is an indicator of prejudice to the nonmoving party).

The Awbreys wanted to claim that Pring breached its implied duties of care and good faith to Clipper when Pring leased the rental property to a new tenant for terms alleged to be unfavorable to the Awbreys. The Awbreys argued Pring could sue the Awbreys for deficiency damages because the new tenant's rent was lower than Clipper's. But Pring is not seeking deficiency damages. Pring is suing for damages arising only from three months of unpaid rent. The Awbreys' proposed claim, then, would not have offset their liability for June, July, and August rent. The claim would have introduced an issue remote to the narrow issue of liability for three months' unpaid rent asserted by Pring. The court properly refused to allow the claim because it likely would have prejudiced Pring. *Id.*

The court also denied the Awbreys' request to add claims alleging contribution

and forgery against the other guarantors because Pring had no interest in the issues and, consequently, would be prejudiced if they were added. Again, a court properly denies a motion to amend when the amendment would prejudice the nonmoving party. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 737-38, 837 P.2d 1000 (1992); *Herron*, 108 Wn.2d at 166. And prejudice can result from potential delay, unfair surprise, or the introduction of remote issues. *Herron*, 108 Wn.2d at 165-66.

The prejudice here would have resulted from delay and the introduction of remote issues. First, Pring's suit against the Awbreys would have been delayed while the Awbreys attempted to serve the defaulted guarantors and exchange pleadings. Second, the Awbreys' proposed claims against the defaulted guarantors did not concern Pring. Pring had the right to recover from the Awbreys alone because they were jointly and severally liable to Pring under the guaranty. The court did not abuse its discretion by denying the Awbreys' motion to amend their answer to add claims of contribution and forgery against the other guarantors. *Id.* at 166.

Issues of Fact – Breach of Contract

The Awbreys next argue that issues of fact remain over whether Pring breached the lease by reentering the rental property and allegedly allowing The Sourdough Place, a potential subtenant, to take possession prematurely.

We review a summary judgment de novo. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 768, 174 P.3d 54 (2007). Summary judgment is proper when the record, viewed in the light most favorable to the nonmoving party, presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Adams v. King County*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008). We consider only evidence and issues called to the trial court's attention. RAP 9.12.

To avoid summary judgment, the Awbreys must set forth facts to rebut Pring's contentions and show that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). They may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Id.* at 13.

The record shows that Pring only entered the property at Clipper's request to show it to a potential sublessee, The Sourdough Place. And Pring took possession of the property only *after* the Awbreys stopped paying rent, received notice of their default, and failed to cure the default. There are then no genuine issues of material fact. Pring did not breach the lease.

Pring's claim for money damages against the Awbreys arose from the parties' contract. To prove a breach of contract claim, Pring had to produce evidence sufficient to show the existence of: (1) a contract, (2) a material breach of that contract, and (3)

resulting damage. *St. John Med. Ctr. v. Dep't of Soc. & Health Servs.,* 110 Wn. App. 51, 64, 38 P.3d 383 (2002).

Here, undisputed evidence establishes all three elements. The Awbreys concede that they signed a lease with Pring as Clipper's personal guarantors, guaranteeing Clipper's rent payments among other things. They concede that they paid partial rent in June 2007 and that no one paid rent for July and August 2007—they defaulted. And Pring's accountings showed that Clipper owed a total of $8,679.03 plus interest for June, July, and August rent. The trial court properly determined that Pring was entitled to judgment as a matter of law based on these undisputed facts.

Pring's Cross-Appeal

Pring contends that the trial court erred by not awarding it fees for the time its attorneys spent establishing Washington's personal jurisdiction over the Awbreys. Pring argues that it was entitled to all fees and costs reasonably expended in this case. It asserts that the trial court, nonetheless, deducted all fees generated by responding to the Awbreys' motion to dismiss. It contends that the lease and RCW 4.84.330 require an award of all attorney fees incurred in its action against the Awbreys. And it maintains that the time spent on personal jurisdiction was necessary for Pring to prevail because it could not have enforced the lease's guaranty provision without proving personal

jurisdiction.

We review the amount of an attorney fee award for abuse of discretion. *Ermine v. City of Spokane,* 143 Wn.2d 636, 641, 23 P.3d 492 (2001).

Pring requested $18,877.50 in attorney fees for pursuing its breach of contract claim and for defending against the Awbreys' lack of personal jurisdiction claim. CP at 500. The trial court, however, awarded Pring only $16,077.50 in fees. It did not award Pring those fees arising from work related to other defendants in the case ($100) or the Awbreys' personal jurisdiction issue ($2,700). And a later stipulated order corrected a clerical error in Pring's fee request and reduced the award by $345 to $15,732.50. Pring argues that the court should have awarded it the $2,700 for work done on the jurisdiction issue.

A court must enter findings of fact and conclusions of law that support its attorney fees award. *Mehlenbacher v. DeMont,* 103 Wn. App. 240, 249, 11 P.3d 871 (2000). The trial court here did not enter findings and conclusions. And the transcript from the attorney fees hearing shows that the court segregated compensable hours from noncompensable hours but does not show why the court withheld $2,700 for work related to the personal jurisdiction issue as noncompensable. *See* Report of Proceedings at 31-33. It is not clear whether the court determined that the challenged fees were

unauthorized, unreasonable, or otherwise not available. Findings and conclusions are necessary to properly review this issue. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 343, 54 P.3d 665 (2002). We, therefore, remand for reconsideration and entry of appropriate findings and conclusions. *Mehlenbacher,* 103 Wn. App. at 249.

Both parties request attorney fees on appeal. We may award reasonable attorney fees on appeal only if allowed by applicable law and requested pursuant to RAP 18.1(a). *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003).

RAP 14.2 provides that we will award costs to the substantially prevailing party. Pring is the substantially prevailing party here. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987). And *Landberg v. Carlson* provides that a party entitled to attorney fees at trial who also prevails on appeal is entitled to attorney fees on appeal as well. 108 Wn. App. 749, 758, 33 P.3d 406 (2001). The trial court here awarded Pring fees at trial.

We, therefore, award Pring those fees and costs incurred on appeal. RAP 14.2; *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 915, 146 P.3d 935 (2006); *Landberg*, 108 Wn. App. at 758. The superior court should also determine the amount of appellate fees on remand. RAP 18.1(i).

Holding

We remand for reconsideration of Pring's attorney fees and for entry of appropriate findings and conclusions on that question. We affirm the remainder of the court's judgment, and we award fees on appeal to be set by the trial court on remand.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

_____
Sweeney, J.

_____
Kulik, A.C.J.

_____
Brown, J.